

82-1628

No. _____

Office-Supreme Court, U.S.
FILED

APR 5 1983

ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

In the Matter of the Liquidation of
ALL-STAR INSURANCE CORPORATION,
a Wisconsin Corporation
RODERICK B. McNAMEE,
Special Deputy Commissioner of
Insurance of the State of Wisconsin
for the Liquidation of All-Star
Insurance Corporation,

Appellee,

vs.

APS INSURANCE AGENCY, INC.,

Appellant.

ON APPEAL FROM THE
SUPREME COURT OF WISCONSIN

JURISDICTIONAL STATEMENT AND
APPENDIX

MAURICE J. MCSWEENEY
MICHAEL A. BOWEN
FOLEY & LARDNER
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400

Attorneys for Appellant

NOTICE

Notice is given that the constitutionality of Section 645.04(5)(a), Wisconsin Statutes, is drawn in question and that 28 U.S.C. §2403(b) may be applicable.

QUESTION PRESENTED

Does Section 645.04(5)(a) of the Wisconsin Statutes, as applied to this appellant, deprive appellant of due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States by permitting the exercise of personal jurisdiction over appellant despite the absence of sufficient minimum contacts between appellant and the State of Wisconsin?

LIST OF PARTIES

The names of all parties to the proceeding in the Court of the State of Wisconsin are contained in the caption of the case in this Court.¹

¹The proceeding in the Supreme Court of Wisconsin was consolidated with Appeal No. 81-1350, *Roderick B. McNamee, etc. v. Lee M. Scarborough & Company*, for purposes of oral argument and decision only.

TABLE OF CONTENTS

NOTICE OF APPLICABILITY OF 28 U.S.C. §2403(b)	i
QUESTION PRESENTED	i
LIST OF PARTIES	i
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY CITATIONS	2-3
STATEMENT OF THE CASE	3-5
WHY THE QUESTION PRESENTED IS SO SUBSTANTIAL AS TO MERIT PLENARY CONSIDERATION	6-7
CONCLUSION	8
Appendix A — Opinion of the Wisconsin Supreme Court	1A-15A
Appendix B — Notice of Appeal	16A-17A

TABLE OF AUTHORITIES

CASES:

<i>In the Matter of the Liquidation of All-Star Insurance Corporation</i> , 110 Wis. 2d 72, —N.W. 2d — (1983)	5, 7
<i>Pennington v. Toyomenka, Inc.</i> , 512 F. 2d 1291 (5th Cir. 1975)	7

STATUTES:**United States Constitution:**

Fifth Amendment	i, 2, 6
Fourteenth Amendment, Sec. 1	i, 2, 6

Federal Statutes:

28 U.S.C. §1257(2)	1, 16A
28 U.S.C. §2403(b)	i, 17A

Wisconsin Statutes:

Wis. Stats. Chap. 645	6
Wis. Stats. §645.04(5)(a)	i, 2, 4, 17A

OTHER AUTHORITIES:

13 Uniform Laws Annotated 429 (1980)	6
--	---

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court is reported as *IN the MATTER OF the LIQUIDATION OF ALL-STAR INSURANCE CORPORATION*, a Wisconsin Corporation, Roderick B. McNAMEE, Special Deputy Commissioner of Insurance of the State of Wisconsin for the liquidation of All-Star Insurance Corporation, Plaintiff-Respondent, v. *APS INSURANCE AGENCY, INC.*, Defendant-Appellant [Case No. 81-1349]; *IN the MATTER OF the LIQUIDATION OF ALL-STAR INSURANCE CORPORATION*, a Wisconsin Corporation, Roderick B. McNAMEE, Special Deputy Commissioner of Insurance of the State of Wisconsin for the liquidation of All-Star Insurance Corporation, Plaintiff-Respondent, v. *LEE M. SCARBOROUGH & COMPANY*, Defendant-Appellant [Case No. 81-1350], 110 Wis. 2d 72, — N.W. 2d — (1983). It is reproduced as Appendix A, *infra*.

JURISDICTION

This is a civil action to recover damages allegedly suffered by All-Star Insurance Corporation (hereinafter, "All-Star") as a result of APS Insurance Agency, Inc.'s (hereinafter, "APS") failure to pay amounts claimed to be due to All-Star pursuant to an insurance agency agreement between those two parties. The judgment of the Wisconsin Supreme Court appealed from herein was entered on January 5, 1983. Notice of Appeal of that judgment was filed in the Wisconsin Supreme Court, the Wisconsin Court of Appeals, and the Milwaukee County Circuit Court on April 4, 1983. This Court has jurisdiction under 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY CITATIONS

This case raises questions under the Fifth Amendment and Section One of the Fourteenth Amendment to the Constitution of the United States.

The Fifth Amendment to the United States Constitution provides that:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section One of the Fourteenth Amendment to the Constitution of the United States provides that:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves Wis. Stats §645.04(5)(a), which provides as follows:

"(5) PERSONAL JURISDICTION, GROUNDS FOR. In addition to other grounds for jurisdiction provided by the law of this state, a court of this state having jurisdiction of the subject matter has jurisdiction over a person served pursuant to s. 801.11 in an action brought by the receiver of a domestic insurer or an alien insurer domiciled in this state:

"(a) If the person served is obligated to the insurer in any way as an incident to any agency or brokerage arrangement that may exist or has existed between the insurer and the agent or broker, in any action on or incident to the obligation;"

STATEMENT OF THE CASE

This is an appeal from a decision of the Supreme Court of the State of Wisconsin, entered on January 5, 1983. The decision appealed from affirmed in part and in part remanded for further proceedings a Judgment entered by the Milwaukee County Circuit Court on June 26, 1981.

The Wisconsin Supreme Court affirmed that portion of the Circuit Court judgment rejecting the claim of APS that the Milwaukee County Circuit Court lacked personal jurisdiction over it. The Wisconsin Supreme Court remanded to the Wisconsin Court of Appeals the portion of the Circuit Court decision holding against APS on the merits of the contract claims.

On March 14, 1983, the Wisconsin Court of Appeals affirmed in part and in part reversed and remanded for further proceedings the portion of the Circuit Court Judgment addressing the merits of the contract claims. The decision of the Wisconsin Court of Appeals is not pertinent to the issues raised on this appeal.

The State of Wisconsin's Special Deputy Commissioner of Insurance for the liquidation of All-Star Insurance Corporation (hereinafter, "the liquidator") began this action on May 14, 1979 by filing a summons and complaint against APS. The liquidator sought to recover premiums which APS had allegedly retained after collecting them from insureds whose risks APS had placed with All-Star. The liquidator also sought to recover the *pro rata* portion of commissions which APS had earned on insurance policies procured from All-Star, which policies had been cancelled because of All-Star's liquidation. Both claims arose from an agency agreement entered into between the parties on June 1, 1973. The liquidator asserted the personal jurisdiction of the Milwaukee County Circuit Court over APS pursuant to the provisions of Wis. Stats. §645.04(5)(a).

Appellant's contacts with the State of Wisconsin were correctly summarized by the Wisconsin Supreme Court, in the decision appealed from, as follows:

"APS is an Illinois corporation and entered into an agency contract with All-Star on June 1, 1973. APS's relationship with All-Star began at All-Star's initiation, when All-Star asked APS to serve as its agent. In October, 1975 APS stopped serving as All-Star's agent pursuant to an order from the Illinois Insurance Commissioner

"The only contacts either defendant [*i.e.*, APS and Lee M. Scarborough & Company] ever had with Wisconsin were their respective agency contracts with All-Star and their actions incident to those contracts. Neither defendant is licensed to do business in Wisconsin. The defendants have no place of business, office, property, mailing address, telephone listing, bank account nor any agents or em-

ployees in the state. Neither defendant has engaged in any business in the state, nor has authorized any agent or employee to transact business in Wisconsin. All the contacts between the defendants and All-Star pursuant to the agency contracts occurred outside of Wisconsin or by interstate mail or telephone."

In the Matter of the Liquidation of All-Star Insurance Corporation, 110 Wis. 2d 72, 74-75, — N.W. 2d — (1983); Appendix at 3A.

APS moved on July 5, 1979 to dismiss plaintiff's complaint for lack of personal jurisdiction. In a decision from the bench announced on November 19, 1979, the Milwaukee County Circuit Court denied APS's motion. APS thereupon answered, specifically reserving its jurisdictional objection and denying liability on the merits.

In a decision announced from the bench on April 6, 1981, the Milwaukee County Circuit Court granted the liquidator's motion for summary judgment against APS. Judgment was entered on June 26, 1981. On July 14, 1981, APS appealed from the whole of the Milwaukee County Circuit Court judgment to the Wisconsin Court of Appeals. On May 7, 1982, the Wisconsin Court of Appeals certified the personal jurisdiction issue to the Wisconsin Supreme Court. That court rejected APS's position on the jurisdictional issue by judgment entered on January 5, 1983. APS brings this appeal.

WHY THE QUESTION PRESENTED IS SO SUBSTANTIAL AS TO MERIT PLENARY CONSIDERATION.

The issue raised on this appeal is identical in all material respects to that raised by the appeal of Lee M. Scarborough & Company from the same judgment appealed from herein. As noted in the jurisdictional statement filed on behalf of Lee M. Scarborough & Company, the balance struck by the Wisconsin Supreme Court between Wisconsin's interest in regulating the insurance industry within that state's borders, and appellant's interest in being subjected to personal jurisdiction only in those states where it has invoked the benefits and protections of local law, so far favors the former as effectively to disregard the latter. Because that dismissal of appellant's interests offends the due process guarantees of the Fifth and Fourteenth Amendments, the Wisconsin Supreme Court's decision should be reversed.

The Court's attention is respectfully invited to the jurisdictional statement of Lee M. Scarborough & Company, with which appellant herein entirely agrees. Appellant submits that two additional considerations emphasize the appropriateness of plenary review in this case.

First, the jurisdictional provision at issue here is part of a comprehensive statute modeled on the Uniform Insurers Liquidation Act. *See* 13 Uniform Laws Annotated 429 *et seq.* (1980); *compare* Wis. Stats. Chap. 645. The model act includes a broad jurisdictional provision. *Id.* at 456. Although 32 states, including Wisconsin, have adopted versions of the Uniform Insurers Liquidation Act, *see id.* at 429, however, only four states besides Wisconsin have adopted special, sweeping jurisdictional pro-

visions like the one at issue here. See *In the Matter of Liquidation of All-Star Insurance Corporation*, 110 Wis. 2d 72, 77 n. 3, — N.W. 2d — (1983). The specific determination of the vast majority of states adopting this legislation that assertion of extraordinary jurisdictional privileges was not necessary to effective implementation of the legislation is persuasive evidence that the state's interest in disregarding customary due process limits is not a compelling one.

Second, the situation most clearly analogous to the one at bar is that of a bankruptcy trustee whose bankrupt has claims or potential claims against out-of-state parties. The interest in efficient administration of the insolvent estate and in protection of persons having claims against the insolvent company is the same in both situations. It is well settled, however, that jurisdictional limitations applicable to civil actions generally apply likewise to an action brought by the trustee. See, e.g., *Pennington v. Toyomenka, Inc.*, 512 F. 2d 1291 (5th Cir. 1975) (per curiam) (analyzing personal jurisdiction over defendant in action brought by bankruptcy trustee solely in terms of state long-arm statute, and holding that absence of sufficient minimum contacts with forum state precluded assertion of personal jurisdiction over defendant).

There is no reason that any different rule should apply here.

CONCLUSION

For the reasons outlined herein, the decision of the Wisconsin Supreme Court appealed from herein should be reversed, and this matter should be remanded to the state court with direction to dismiss the complaint.

Dated this _____ day of April, 1983.

**MAURICE J. McSWEENEY
MICHAEL A. BOWEN**

FOLEY & LARDNER

By _____
Maurice J. McSweeney
Attorneys for Appellant

FOLEY & LARDNER
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

(414) 271-2400

APPENDIX A

IN the MATTER OF the LIQUIDATION OF ALL-STAR INSURANCE CORPORATION, a Wisconsin Corporation,

RODERICK B. McNAMEE, Special Deputy Commissioner of Insurance of the State of Wisconsin for the liquidation of All-Star Insurance Corporation, Plaintiff-Respondent,

v.

**APS INSURANCE AGENCY, INC.,
Defendant-Appellant. [Case No. 81-1349.]**

IN the MATTER OF the LIQUIDATION OF ALL-STAR INSURANCE CORPORATION, a Wisconsin Corporation,

RODERICK B. McNAMEE, Special Deputy Commissioner of Insurance of the State of Wisconsin for the liquidation of All-Star Insurance Corporation, Plaintiff-Respondent,

v.

**LEE M. SCARBOROUGH & COMPANY,
Defendant-Appellant. [Case No. 81-1350.]**

Supreme Court

**Nos. 81-1349, 81-1350. Argued December 1, 1982. —
Decided January 5, 1983.**

(On certification from court of appeals.)

APPEALS from judgments of the circuit court for Milwaukee county: WILLIAM A. JENNARO, Circuit Judge. *Affirmed.*

For the appellant there were briefs by *Maurice J. McSweeney, Michael A. Bowen and Foley & Lardner*, Milwaukee, and oral argument by *Mr. Bowen*. [Case No. 81-1349.]

For the respondent there was a brief by *Matthew J. Flynn, John A. Rothstein, James A. Urdan and Quarles & Brady*, Milwaukee, and oral argument by *Mr. Flynn*. [Case No. 81-1349.]

For the appellant there were briefs by *Christine K. Ohm, Michael J. Pfau and Kluwin, Dunphy, Hankin & McNulty*, Milwaukee, and oral argument by *Ms. Ohm*. [Case No. 81-1350.]

For the respondent there was a brief by *Matthew J. Flynn, John A. Rothstein, James A. Urdan and Quarles & Brady*, Milwaukee, and oral argument by *Mr. Flynn*. [Case No. 81-1350.]

BEILFUSS, C. J. This is an appeal from judgments entered based upon orders granting summary judgment in favor of the plaintiff in two actions which were consolidated before the circuit court and for purposes of appeal.

These appeals arise out of the liquidation of the All-Star Insurance Corporation. All-Star, a Wisconsin corporation formerly engaged in the business of insurance, was ordered into liquidation on March 1, 1977, pursuant to ch. 645, Stats. 1977. The plaintiff, Roderick B. McNamee was appointed Special Deputy Commissioner of Insurance for the purposes of All-Star's liquidation. In this capacity, the plaintiff commenced these actions against the defendants, APS Insurance Agency, Inc. (APS) and Lee M. Scarborough & Company (Scarborough), to recover sums allegedly due under separate

agencies contracts between the two defendants and All-Star.¹

Both defendants separately entered into agency agreements with All-Star and served as agents soliciting applications for insurance for All-Star pursuant to these agreements. APS is an Illinois corporation and entered into an agency contract with All-Star on June 1, 1973. APS's relationship with All-Star began at All-Star's initiation, when All-Star asked APS to serve as its agent. In October, 1975 APS stopped serving as All-Star's agent pursuant to an order from the Illinois Insurance Commissioner. Scarborough is a Louisiana corporation and entered into its agency contract with All-Star on April 18, 1973. It appears that the agency agreement was in effect until the time All-Star was ordered into liquidation, but the record is not entirely clear on this point.

The only contacts either defendant ever had with Wisconsin were their respective agency contracts with All-Star and their actions incident to those contracts. Neither defendant is licensed to do business in Wisconsin. The defendants have no place of business, office, property, mailing address, telephone listing, bank account nor any agents or employees in the state. Neither defendant has engaged in any business in the state, nor has authorized any agent or employee to transact business in Wisconsin. All the contacts between the defendants and All-Star pursuant to the agency contracts occurred outside of Wisconsin or by interstate mail or telephone.

In 1979 the plaintiff commenced these actions against the defendants to recover unpaid premium and unearned

¹ These actions are two of many commenced by the liquidator against allegedly nonpaying agents.

commissions allegedly owed to All-Star under the contracts. Both defendants moved to dismiss the complaints for lack of personal jurisdiction. The trial court consolidated the cases for the hearing on the merits of the motions.

The trial court denied the motions finding personal jurisdiction pursuant to sec. 645.04(5)(a), Stats. The court rejected the defendants' contention that the exercise of personal jurisdiction pursuant to this statute was unconstitutional. The court held that the Supreme Court's decision in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), allowed the exercise of personal jurisdiction pursuant to such a special jurisdictional statute primarily because of the regulated nature of the insurance industry.

The trial court subsequently entered summary judgment in favor of the plaintiff on the merits of the actions as to both defendants. APS appealed both the personal jurisdiction issue and the determination on the merits. Scarborough appealed only as to the issue of personal jurisdiction. We accepted the appeal on certification from the court of appeals.

The issue on review is whether a Wisconsin court may constitutionally exercise jurisdiction over the defendants pursuant to sec. 645.04(5)(a), Stats. We hold that the assertion of jurisdiction pursuant to this statute does not violate due process.

[1]

The determination of whether Wisconsin courts have jurisdiction over a nonresident defendant is a two-step process. First, it must be determined whether the defendants' contacts with Wisconsin subject them to jurisdic-

tion under a Wisconsin long arm statute. If so, then the court must determine whether the exercise of jurisdiction under the statute comports with due process requirements. *Hasley v. Black, Sivalis & Bryson, Inc.*, 70 Wis. 2d 562, 575, 235 N.W.2d 446 (1975); *Zerbel v. H. L. Federman & Co.*, 48 Wis. 2d 54, 60, 179 N.W.2d 872 (1970).²

Because this case arises out of the liquidation of All-Star, jurisdiction over the defendants is asserted under sec. 654.04(5) (a), Stats., which provides:

"(5) PERSONAL JURISDICTION, GROUNDS FOR. In addition to other grounds for jurisdiction provided by the law of this state, a court of this state having jurisdiction of the subject matter has jurisdiction over a person served pursuant to s. 801.11 in an action brought by the receiver of a domestic insurer or an alien insurer domiciled in this state:

"(a) If the person served is obligated to the insurer in any way as an incident to any agency or brokerage arrangement that may exist or has existed between the insurer and the agent or broker, in any action on or incident to the obligation;"

This statute is a special jurisdictional statute applicable in liquidation proceedings under ch. 645, Stats. The statute allows the exercise of jurisdiction over any person who is obligated to a Wisconsin insurer involved in a ch. 645 proceeding, incident to an agency or brokerage

² But see *Lincoln v. Seawright*, 104 Wis. 2d 4, 10, 310 N.W.2d 596 (1981) and cases cited therein for the presumption of due process when sec. 801.05, Stats., the general long-arm statute, is complied with. We deal here with sec. 645.04(5) (a) which has a somewhat different origin and different concern.

agreement.³ Both defendants concede that the language of sec. 645.04(5)(a) covers their situation. Thus, the only issue before this court is whether the exercise of jurisdiction pursuant to this statute is constitutional.

[2-4]

The fourteenth amendment limits the power of a state court to render a valid personal judgment against a non-resident defendant. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). A state court may exercise jurisdiction over a nonresident if "minimum contacts" exist between the defendant and the forum such that the assertion of jurisdiction is consistent with "'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). Physical presence is not required; the defendant need only act indirectly in the state. *Wisconsin Electrical Manufacturing Co., Inc. v. Pcnnant Products, Inc.*, 619 F.2d 676, 678 n 6 (7th Cir. 1980). The relationship between the defendant and the forum must be such that it is reasonable and fair to require the defendant to defend the particular suit in the particular forum. *World-Wide Volkswagen*, 444 U.S. at 564. Thus, the touchstone of the exercise of jurisdiction is reasonableness and fairness.

The defendants contend that the exercise of jurisdiction in these actions violates due process. They assert that the statute is unconstitutional on its face because it

³ Four other states have adopted a similar jurisdiction statute. Idaho Code Sec. 41-3304 (Supp. 1981); Ky. Rev. Stat. Sec. 304.33-040 (1981); Mont. Code Ann. Sec. 33-2-1306 (1981); Nev. Rev. Stat. Sec. 696 B. 200 (1980).

allows the exercise of jurisdiction without requiring even a single isolated contact with Wisconsin. They further contend that the statute, as applied, is unconstitutional because it allows the exercise of jurisdiction where the nonresident's only contact with the state is a contract with a Wisconsin plaintiff. We believe that under the decision in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) both these arguments fail.

McGee involved a suit instituted in California by the beneficiary of a life insurance policy against the Texas insurance company which denied coverage. The only contacts between the insurer and California were the mailing of a reinsurance certificate to the insured in California and the policyholder's payment of the premiums by mail. The court found that due process was not violated by the exercise of jurisdiction based on these minimal contacts finding that "[i]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State." 355 U.S. at 223. The court reasoned:

"The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof. Often the crucial witnesses—as here on the company's defense of suicide—will be found in the insured's locality. Of course, there may be inconvenience to the insurer if it is held amenable

to suit in California where it had this contract but certainly nothing which amounts to a denial of due process. *Cf. Travelers Health Assn. v. Virginia ex rel. State Corporation Comm'n*, 339 N.S. 643. There is no contention that respondent did not have adequate notice of the suit or sufficient time to prepare its defenses and appear." 355 U.S. 223-24.

This court as well as the United States Supreme Court have both recognized that *McGee* is based on the principle that states have a strong interest in providing their citizens with a forum in insurance disputes. This court in *Nagel v. Grain Cutter Co.*, 50 Wis. 2d 638, 649-50, 184 N.W.2d 876 (1971) stated:

"For example, in *McGee v. International Life Ins. Co.*, the state had a special interest in 'providing effective means of redress for its residents when their insurers refuse to pay claims.' To effectuate its public policy, California enacted a statute specifically holding non-resident insurers amenable to the jurisdiction of California courts. *The special public interest of the individual states in the insurance industry is well recognized.* . . . While public interest is not enough, in and of itself, to constitutionally justify the exercise of personal jurisdiction over a foreign defendant, this court has indicated that it is a factor of some significance." (Emphasis supplied).

And as stated by the United States Supreme Court in *Hanson v. Denckla*, 357 U.S. 235, 252 (1958) in distinguishing *McGee*:

"This case is also different from *McGee* in that there the State had enacted special legislation (Unauthorized Insurers Process Act) to exercise what *McGee* called its 'manifest interest' in providing effective redress for citizens who had been injured by nonresidents engaged in an activity that the State treats as exceptional and subjects to special regulation."

Thus, where the state's interest in "providing effective means of redress for its residents" is strong, as in the highly regulated area of insurance, the minimum contacts requirements of *International Shoe* can be met through a single isolated contract. *Zerbel*, 48 Wis. 2d at 69.

There is some controversy as to whether *McGee* was limited by the decision in *Hanson v. Denckla*, 357 U.S. 235 (1958), decided the same term as *McGee*.⁴ However, both the United States Supreme Court and this court have recognized the continuing validity of the *McGee* decision. In *Hasley v. Black, Sivalis & Bryson, Inc.*, 70 Wis. 2d at 583, this court examined both *McGee* and *Hanson* and found that the *Hanson* decision "did acknowledge the correctness of *McGee*." The court went on to distinguish *Hanson* from *McGee* and stated: "*Hanson* is best viewed as an application of the due process standard to a particular factual situation." *Id.* More importantly, recent United States Supreme Court decisions have reaffirmed the continuing validity of *McGee*. See, *Rush v. Savchuk*, 444 U.S. 320, 333 (1980); *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292-93 (1980); *Kulko v. California Superior Court*, 436 U.S. 84, 98 (1978).

We find that the *McGee* decision is applicable and controlling in this case. This case arises out of liquidation proceedings instituted pursuant to ch. 645, Stats. Ch. 645

⁴ This controversy surrounds the effect of the following statements in *Hanson*:

"[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." 357 U.S. at 253.

For a detailed discussion of the effect of this language see, *Zerbel*, 48 Wis. 2d at 60-62.

was enacted in 1967 as the product of a comprehensive study and revision of the insurance laws and redesigned all aspects of insurance delinquency proceedings.⁵ It sets up a comprehensive framework for the complete, orderly and efficient liquidation of insolvent Wisconsin insurance companies in order to fairly distribute the unavoidable burden of delinquency.⁶ The purposes are more explicitly stated in sec. 645.01 (4), which provides:

"(4) PURPOSE. The purpose of this chapter is the protection of the interests of insureds, creditors, and the public generally, with minimum interference with the normal prerogatives of proprietors, through:

"(a) Early detection of any potentially dangerous condition in an insurer, and prompt application of appropriate corrective measures, neither unduly harsh nor subject to the kind of publicity that would needlessly damage or destroy the insurer;

"(b) Improved methods for rehabilitating insurers, by enlisting the advice and management expertise of the insurance industry;

"(c) Enhanced efficiency and economy of liquidation, through clarification and specification of the law, to minimize legal uncertainty and litigation;

"(d) Equitable apportionment of any unavoidable loss;

"(e) Lessening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the liquidation process, and by extension of the scope of personal jurisdiction over debtors of the insurer outside this state; and

"(f) Regulation of the insurance business by the impact of the law relating to delinquency procedures and substantive rules on the entire insurance business."

⁵ 1967 Committee Comment accompanying ch. 647, W.S.A. at 400.

⁶ *Id.*, at 401.

The chapter is based substantially on the Uniform Insurers Liquidation Act which is integrated into ch. 645, Stats., and "both modified and extended to assure more efficient regulation of interstate delinquency problems."⁷ Over thirty other states have also adopted the Uniform Act.⁸

As part of this chapter the legislature enacted sec. 645.04(5)(a), Stats., which allows Wisconsin courts to obtain jurisdiction over nonresident agents and brokers in order to efficiently and inexpensively gather up the outstanding assets of the insolvent insurer. As stated in the interpretative commentary accompanying sec. 645.04(5):

"Sub. (5): This subsection extends the jurisdiction of the Wisconsin court in order to strengthen the hand of the receiver. *In so doing, however, it still assures 'fair play and substantial justice,' (see International Shoe Co. v. Washington, 66 S. Ct. 154, 326 U.S. 310, 316, 90 L. Ed. 95, 161 A.L.R. 1057 (1945) to any defendants affected by this new basis of jurisdiction. When a formal delinquency proceeding begins, agents' balances are likely to constitute a large share of the insurer's assets. Moreover, they are assets difficult to collect. To facilitate gathering the funds, the Wisconsin courts are given expanded personal jurisdiction, making it easier and more economical to reduce these claims to judgment. Of course, actual collection will still require proceedings where the defendant's assets can be found, but the full faith and credit clause and the Uniform Enforcement of Foreign Judgments Act (s. 270.46) [U.L.A.] will make that part of the task easier. The other 2 grounds for jurisdiction may be used to help undo transactions by which the insurer's assets were systematically depleted,*

⁷ *Id.*, at 405.

⁸ See, ch. 645, W.S.A. at 50 (Supp. 1982-83).

if appropriate defendants can be found. The connections between the insurer and the persons listed in this subsection are close enough that a statute giving such personal jurisdiction, for purposes of actions arising out of the relationship, satisfies the requirements of due process.

"The Uniform Insurers Liquidation Act [U.L.A.] gives the domiciliary receiver the primary right to collect agents' balances. Par. (a) facilitates his doing so when this state is the domiciliary state by providing for jurisdiction here. See s. 645.83(1) for the Uniform Act provision giving the primary right where another state is the domiciliary state." (Emphasis supplied.) Ch. 645, W.S.A. at 418.

Like California in *McGee*, Wisconsin has enacted a special jurisdictional statute which asserts the state's "manifest interest" in providing an efficient and inexpensive forum for the liquidation of Wisconsin insurers. Cf. *Kulko v. California Superior Court*, 436 U.S. at 98. The plaintiff is the special deputy appointed to liquidate All-Star. Therefore, this case involves, in substance, actions by the state of Wisconsin acting through the liquidator to protect, among others, the collective interests of Wisconsin residents who are policyholders, claimants and creditors of All-Star. The state's interest is even more compelling than in *McGee* because the plaintiff represents numerous Wisconsin residents. "These residents would be at a severe disadvantage if [the plaintiff was] forced to follow [these insurance agents] to a distant State in order to hold [them] legally accountable." *McGee*, 355 U.S. at 223.

[5]

The defendants are involved in the highly regulated insurance business. They both acted as agents soliciting insurance applications which were sent to All-Star in Wisconsin. All-Star performed its part of the contract

entirely in Wisconsin. Scarborough and APS acted as agents for All-Star for four and two years, respectively. During these years the defendants made numerous phone calls to Wisconsin. Further, the contract required that the defendants send, on a monthly basis, premium payments to Wisconsin on all applications solicited by the defendants and accepted by All-Star. Thus, the two agency contracts between the defendants and All-Star had a "substantial connection" with the state of Wisconsin.

Moreover, because these actions are just two of many instituted against agents of All-Star, it is clear that most of the witnesses and evidence is located in Wisconsin. The burden and inconvenience on the defendants in having to defend in Wisconsin rather than Louisiana or Illinois is not so unreasonable that it results in a denial of due process.

The defendants rely on cases such as *Lakeside Bridge & Steel Co. v. Mountain State Construction Co., Inc.*, 597 F.2d 596 (7th Cir. 1979) and *Capitol Indem. Corp. v. Certain Lloyds Underwriters*, 487 F. Supp. 1115 (W.D. Wis. 1980), for the proposition that merely entering into a contract with a Wisconsin resident is not sufficient to confer jurisdiction. They contend that the *Lakeside*-type decisions are applicable because this is merely a contract dispute between two corporations who are involved in the insurance business. They distinguish *McGee* on the grounds that it involved an individual asserting coverage against a foreign insurer rather than a contract dispute between two corporations. We disagree.

The defendants' arguments oversimplify the posture of this case. The instant case does not involve two corporations in a contract dispute as in *Lakeside*. Rather,

as stated above, the plaintiff is the representative of the state of Wisconsin and is charged with the duty of effecting the efficient liquidation of a domestic insurance company. The purpose behind the actions instituted by the plaintiff against these defendants is to protect Wisconsin residents who have claims or an interest in All-Star. This interest, as asserted by the enactment of sec. 645.04(5)(a), Stats., and the connection of the agency contracts with the state of Wisconsin, brings this case squarely within the *McGee* decision. No similar public interest was present in the cases cited by the defendants. Rather the cases specifically distinguished *McGee* on the grounds the decision "was based in substantial part on the special nature of the business of insurance."⁹ Therefore we find that they have no application to the instant case which involves basically the same public interest as in *McGee*.¹⁰

In conclusion, we believe that it is fair and reasonable to exercise jurisdiction over the defendants. The litigation is connected to the forum because it involves the liquidation of a Wisconsin insurer. The defendants are linked to Wisconsin by virtue of their contracts with All-Star and their actions incident to the contracts. Wisconsin has a manifest interest in providing an efficient and inexpensive forum in which to liquidate domestic insurance companies in order to protect its citizens. Finally, the burden on the defendants to defend in Wisconsin is

⁹ *Lakeside*, 597 F.2d at 600; *Capitol Indemnity*, 487 F.Supp. at 1119.

¹⁰ It should also be noted that the Seventh Circuit in *Lakeside*, 597 F.2d at 599, recognized the "likelihood" that this court may have decided the case differently citing to *Zerbel v. H. L. Federman & Co.*, 48 Wis. 2d 54, 179 N.W.2d 872 (1970). We express no opinion as to the correctness of the *Lakeside* decision. Instead we find that it is distinguishable from this case.

not unreasonable. Therefore we hold that the defendants are amenable to the jurisdiction of the Wisconsin courts in these actions based on their agency contracts with All-Star.

We do not reach the issues raised by APS on the merits of the trial court's grant of summary judgment in favor of All-Star. We remand these issues to the court of appeals.

By the Court. — Case No. 81-1349 is remanded to the court of appeals for further proceedings not inconsistent with this opinion.

Judgment affirmed in Case No. 81-1350.

ABRAHAMSON, J., took no part.

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982**

In the Matter of the Liquidation of
ALL-STAR INSURANCE CORPORATION,
a Wisconsin Corporation
RODERICK B. McNAMEE,
Special Deputy Commissioner of
Insurance of the State of Wisconsin
for the Liquidation of All-Star
Insurance Corporation,

Appellee,

vs.

APS INSURANCE AGENCY,

Appellant.

**ON APPEAL FROM THE SUPREME COURT
OF WISCONSIN**

NOTICE OF APPEAL

Notice is hereby given that APS Insurance Agency, Inc. hereby appeals to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Wisconsin, Appeal No. 81-1349 entered January 5, 1983. This appeal is taken pursuant to 28 U.S.C. §1257(2).

17A

Further notice is given that the constitutionality of Section 645.04(5)(a), Wisconsin Statutes, is drawn in question and that 28 U.S.C. §2403(b) may be applicable.

Dated at Milwaukee, Wisconsin this 4th day of April, 1983.

MAURICE J. McSWEENEY
MICHAEL A. BOWEN

FOLEY & LARDNER

By _____
Maurice J. McSweeney
Attorneys for Appellant

P.O. ADDRESS:

777 West Wisconsin Avenue
Milwaukee, Wisconsin 53202
414-271-2400

NO. 82-1628

Office - Supreme Court, U.S.
FILED
MAY 19 1983
ALEXANDER L. STEVENS,
CLERK

In the Supreme Court of the United States

October Term, 1982

In the Matter of the Liquidation of
ALL-STAR INSURANCE CORPORATION,
a Wisconsin Corporation

RODERICK B. McNAMEE,
Special Deputy Commissioner of
Insurance of the State of Wisconsin
for the Liquidation of All-Star
Insurance Corporation,

vs.

Appellee,

APS INSURANCE AGENCY, INC.

Appellant.

On Appeal From The
Supreme Court of Wisconsin

MOTION TO DISMISS

Daniel W. Hildebrand
Ross & Stevens, S.C.
One South Pinckney Street
Madison, WI 53703
(608) 257-5353
Attorneys for Appellee

TABLE OF CONTENTS

	Page
Motion to Dismiss	1
Argument	2
Conclusion	5

TABLE OF AUTHORITIES

Cases:

<i>All-Star Insurance Corp. and Roderick B. McNamee vs. Lee M. Scarborough & Company</i> , No. 82-1588	2
<i>Continental Illinois National Bank & Trust Co. v. Chicago, R. I. & P. Ry. Co.</i> , 294 U.S. 648 (1935)	3
<i>McGee v. International Life Insurance Co.</i> , 355 U.S. 220 (1957)	2,3
<i>Northern Pipeline Construction Co. v. Marathon Pipe Line Co.</i> , ____ U.S.____, 102 S.Ct. 2858 (1982)	3
<i>Pennington v. Toyomenka, Inc.</i> , 512 F.2d 1291 (5th Cir. 1975)	3
<i>Robertson v. Railway Labor Board</i> , 268 U.S. 619 (1925)	3
<i>Schaffer v. Heitner</i> , 433 U.S. 186 (1977)	4
<i>Treinies v. Sunshine Mining Co.</i> , 309 U.S. 66 (1939) ..	3

Statutes and Rules:

28 U.S.C. §1471	3
28 U.S.C. §2361	3
Wis. Stats. §645.04(5)(a)	2
Bankruptcy Rule 704	3

No. 82-1628

In the Supreme Court of the United States

October Term, 1982

In the Matter of the Liquidation of
ALL-STAR INSURANCE CORPORATION,
a Wisconsin Corporation

RODERICK B. McNAMEE,
Special Deputy Commissioner of
Insurance of the State of Wisconsin
for the Liquidation of All-Star
Insurance Corporation,

Appellee,

vs.

APS INSURANCE AGENCY, INC.

Appellant.

MOTION TO DISMISS

Pursuant to Rule 16, Supreme Court Rules, Appellees All-Star Insurance Corp., in Liquidation, and Roderick B. McNamee, Special Deputy Commissioner of Insurance for the State of Wisconsin, respectfully move for an Order dismissing the appeal on the ground that it does not present a substantial federal question.

ARGUMENT

The Court's attention is respectfully directed to the argument submitted in Appellees's Motion to Affirm in *All-Star Insurance Corp. and Roderick B. McNamee v. Lee M. Scarborough & Company*, No. 82-1588. Appellee submits the following argument in response to those additional matters set forth in the Jurisdictional Statement of Appellant APS Insurance Agency, Inc.

First, Appellant suggests because only four states besides Wisconsin have adopted special, sweeping jurisdictional provisions, that the state's interest in disregarding customary due process limits is not a compelling one. However, Wisconsin has not disregarded customary due process limits. This is not a case involving a dispute between private parties. In making its argument, appellant failed to analyze the personal jurisdiction statutes of each state having statutes providing for the liquidation of insurers. States adopting the Uniform Insurers Liquidation Act may have applicable broad personal jurisdiction statutes which could be used in liquidation cases. Thus, the absence of specific jurisdictional statutes fails to show that these states would not assert jurisdiction in liquidations upon defendants having "minimum contacts" as described in *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957).

In this case, Wisconsin has determined that the minimum contacts of doing substantial business by mail and the telephone was sufficient to impose jurisdiction in this case. The fact that state long-arm statutes may differ does not mean that Wis. Stats. §645.04(5)(a) violates due process. Due process does not have the purpose of enforcing uniformity of result in matters of public policy. That

certain states may choose to require some form of physical presence to assert jurisdiction over the person would not support the conclusion that Wisconsin courts cannot assert personal jurisdiction in this case based upon the defendant's mail and telephone contacts with a Wisconsin insurer. *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957).

Second, Appellant argues that the situation is analogous to that of a bankruptcy trustee whose bankrupt has claims or potential claims against out-of-state parties. Again, Appellant's argument misses the mark. *Pennington v. Toyomenka, Inc.*, 512 F.2d 1291 (5th Cir. 1975) did nothing more than analyze the applicability of Georgia's long-arm statute to a certain set of facts. Having determined that the bankruptcy trustee did not meet the standards of the Georgia statute, the Court found it unnecessary to discuss any constitutional issues whatsoever.

The power of Congress to legislate in bankruptcy matters and the jurisdiction of federal courts in bankruptcy cases was not involved in *Pennington v. Toyomenka, Inc.*, *supra*, nor is it involved in this case. Congress has provided for nationwide service of process in appropriate cases. See 28 U.S.C. §2361; 28 U.S.C. §1471; Bankruptcy Rule 704. The constitutionality of these service of process statutes and rules cannot be seriously questioned. See *Robertson v. Railway Labor Board*, 268 U.S. 619, 622 (1925); *Continental Illinois National Bank & Trust Co. v. Chicago, R. I. & P. Ry. Co.*, 294 U.S. 648, 682-83 (1935); *Treinies v. Sunshine Mining Co.*, 309 U.S. 66, 70 (1939); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ___ U.S. ___, 102 S.Ct. 2858, 2863 n.4 (1982). Thus, if Appellants correctly argue that the functions of federal courts in bankruptcy matters and state courts in in-

surance liquidations are indeed analogous, jurisdiction should be upheld in this case.

Finally, Appellees would explain why they have moved to dismiss this appeal, rather than move for affirmance. In this case, Appellees seek to collect approximately \$18,000 from Appellant for premiums which Appellant retained after collecting them from insureds whose risks had placed with All-Star, and for certain unearned commissions. The Wisconsin Supreme Court remanded this case to the Wisconsin Court of Appeals. On March 14, 1983, the Wisconsin Court of Appeals reversed the decision of the Circuit Court and further proceedings in the trial court are now required. Although Appellees believe that the decision of the state courts on the federal issue is "final," *Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977), because of the present posture of this case, Appellees do not believe that it merits plenary review by this Court.

CONCLUSION

The decision of the Wisconsin Supreme Court was clearly correct. This appeal should be dismissed for want of a substantial federal question.

Dated: May 4, 1983.

Respectfully submitted,

Daniel W. Hildebrand
Ross & Stevens, S.C.
One South Pinckney Street
Madison, WI 53703
(608) 257-5353
Attorneys for Appellees